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LAND
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Hoku

April 17, 2006

Ms. Aulani Wilhelm
Acting NWHI Reserve Manager
6600 Kalanianaʻolaha Highway, Suite 300
Honolulu, Hawaii 96825

Dear Ms. Wilhelm:

Subject: Comments on Draft Regulations, Draft Environmental Impact Statement, and
Management Plan for the Northwestern Hawaiian Islands National Marine Sanctuary

The following comments are provided by the State of Hawaii in regard to the draft Regulations, Environmental Impact Statement (DEIS), and Sanctuary Management Plan (SMP), all dated April 2006, for the Northwestern Islands (NWHI) National Marine Sanctuary. The comments are provided in three sections, related to each of the three documents listed above. Many of the comments listed initially under the Proposed Sanctuary Regulations also apply in whole or in part to both the DEIS and draft SMP.

PROPOSED SANCTUARY REGULATIONS

In the cover memo accompanying the current set of documents under review, it is requested that the State of Hawaii not render further comment on the proposed Sanctuary Regulations. The State acknowledges this request, however, we provide the following additional comments on the revised Sanctuary Regulations, with the note that many of the issues raised are also applicable to the DEIS and the SMP.

A. State Concerns Met

The State thanks the National Oceanic & Atmospheric Administration (NOAA) for responding to some of our concerns regarding the draft Regulations:

- Mentioning the historical presence of the ikashibi tuna fleet in one sentence in the Preamble.
- Inserting the phrase "or dead" into the prohibition on anchoring on "living coral," i.e., anchoring on live or dead coral.

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- Clarifying that personal "recreational activities" and commercial sport fishing are confined solely to Midway Atoll. The new Regulations, however, appear to eliminate personal "recreational fishing" from confinement to Midway Atoll, allowing it to occur throughout the NWHI in conflict with State rules. In addition, these draft Regulations still allow a wide range of commercial activities (Special Ocean Uses) throughout the archipelago (922.204 (b) Permit Types (6).
- Language has been added clarifying the U.S. Fish and Wildlife Service's (USFWS) role and jurisdictional authority.
- Permit types have been reduced, but are significantly greater than the number issued by the State or the USFWS. Recreational activities have been combined with sport fishing and restricted to Midway Atoll.

B. Continuing State Concerns

In our letter of March 24, 2006, we pointed out inconsistencies between the proposed Sanctuary Regulations and State rules, and identified specific areas where we proposed changes. To facilitate the process of co-management, we are reiterating our concerns in specific areas, including:

Inconsistencies with State rules in Section 922.203, regarding prohibited or otherwise regulated activities.

The State rules stipulate that all activities are prohibited unless specifically permitted. By contrast, the proposed NWHI Sanctuary Regulations allow any activity to occur unless explicitly prohibited. We would note, however, that both the DEIS and the SMP utilize descriptive language indicating that, in the Sanctuary, "everything is prohibited, except that which is explicitly permitted," such as:

1. "The fundamental shift in the management regime in Alternative 2 [and 3] to an ecosystem-based management approach wherein all access is prohibited unless permitted..." (Pg. 4-71 in the DEIS).
2. "All classes of activities, except enforcement activities, emergency response, activities and exercises of the armed forces, and passage without interruption, would be prohibited within Sanctuary boundaries without a permit." (Pg. 4-71 in the DEIS).
3. "The Sanctuary, USFW and State of Hawaii Regulations prohibit all access (except for passage without interruption, activities carried out by the armed forces, law enforcement activities and emergency operations) in their respective NWHI jurisdictions unless the activity is specifically allowed by permit." (Pg. 165 in the SMP).

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As in our earlier letter, the State urges that the Regulations be amended to be consistent with State rules, given that this would also be consistent with the DEIS and SMP descriptions of the proposed sanctuary permitting system as noted above.

In addition, the new draft Regulations exhibit more of a focus on the Native Hawaiians and the 'extensive' evidence of human activity on the islands.

The State would note that there is no doubt about the uses at Nihoa and Mokumanamana, but there is no physical evidence of pre-contact Hawaiian habitation or use on any other islands further to the northwest. Therefore, we recommend a deletion of the reference to "extensive" use on all islands, or note that this use was only extensive at Nihoa and Mokumanamana.

C. Permitting Process

1. The State continues to have concerns regarding the proposed NOAA permitting process, which differs greatly from that utilized by the State and which represents a potential conflict with State rules and permitting guidelines (see additional comments in this regard under the section on the SMP).
The State does not endorse a process by which permits should be issued at the "sole discretion" of Sanctuary Director without public comment, or input by an advisory panel of agency representatives, including experts in invasive species control, marine conservation biology, and Native Hawaiian cultural resources.
2. There is a lack of definition for research, education and other classes of permits.
The State recommends that improved definitions for these permit classes be provided, and made to match the State definitions as closely as possible.
3. The Special Ocean Use permits would appear to allow a wide range of commercial uses, including cruise ship stops and commercial diving, throughout the archipelago.
The State wishes commercial uses, including cruise ship stops and commercial diving operations, to be primarily confined to the Midway Atoll SMA.
4. There is no public notice requirement other than for a subset of Special Ocean Use permits. Nor is there any process specified for public notice of pending permit applications, or on the action taken by the National Marine Sanctuary Programs (NMSP) to grant, deny, or issue permits with conditions.
The State recommends that the permit guidelines be revised to provide for notification to the general public of pending permit applications and to make provision for a period of public comments for permits under review.
5. The Permitting Action Plan Appendix 2 describes a tiered permitting process with levels of permit classes (A, B, and C), and with general criteria for the permit coordinator to follow in deciding which level of review would be required for permits under consideration.

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The State would note that there appears to be no independent review of the permit coordinator's decision to assign a permit to Class A, and review of Class B permits appears to occur solely within the NMSP chain of command. Referral of a permit to outside expert review is thus discretionary and not required, for Class A and B permits. As noted above, the State supports public comment and external review for all permits.

DRAFT SANCTUARY MANAGEMENT PLAN

Overall, the draft Management Plan has evolved over the past year into a document that provides some clarity on the management direction of the proposed NWHI Sanctuary. If, at the appropriate time, the Governor of the State of Hawaii agrees to include State waters in the Sanctuary, there will be a need for certain changes in regard to interagency coordination and the proposed permitting process.

A. Co-management

The proposed Management Plan states that "*collaboration between jurisdictional agencies and stakeholders is essential for establishing cross-jurisdictional management goals and developing and evaluating ecosystem-level plans*" (Pg. 64, lines 4-5).

However, the Permitting Action Plan does not fully reflect the policies and guidelines that have been developed for the State of Hawaii's NWHI Marine Refuge and the State Wildlife Sanctuary at Kure Atoll. In addition, no reference is made to the permitting process that has been developed for the State NWHI Marine Refuge. Furthermore, in examining this document, the State of Hawaii cannot locate any reference to co-management of the Sanctuary with the State. As a result, the State recommends adding the following to the Management Framework section, Mechanisms for Collaboration and Partnership (Pg. 67), after NOAA Coordination on Page 69:

Co-management

The sanctuary will be jointly managed by the sanctuary manager, the State of Hawaii co-manager, and other field staff through a cooperative Federal-State partnership similar to the Hawaiian Islands Humpback Whale National Marine Sanctuary. The sanctuary manager will receive national program guidance from the National Marine Sanctuary Program. Additionally, the State co-manager will receive guidance from the Hawaii Department of Land and Natural Resources.

The sanctuary and NOAA's National Marine Sanctuary Program will work cooperatively with the people of Hawaii to protect these important coral reef ecosystems. Grassroots support is vital to the success of marine sanctuaries. NOAA's partnership with the State, and with the people of Hawaii, will help to ensure that the vast coral reefs, ecosystems and resources of the Northwestern Hawaiian Islands are protected for present

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and future generations.

Collaboration and Partnerships

In the list of jurisdictional authorities, Page 64, change line 34 to read:
State of Hawaii, Department of Land and Natural Resources

International Partnerships

On Page 70, line 29, replace the words "working on" with "preparing" *an application to the U.S. National Park Service etc.*

On line 34, replace the word "help" with "provide global protection for" *the natural and cultural values etc.*

Native Hawaiian Community Involvement Action Plan

Strategy NHCI-1.1 proposes the establishment of a Native Hawaiian Sanctuary Advisory Council working group to *provide an opportunity for the Sanctuary to obtain advice and guidance from Native Hawaiian cultural experts, including kupuna (elders) and practitioners* (Pg. 230, lines 39-40). Will the role of this working group include evaluation of permit applications as advocated above?

B. Permits

The SMP provides for six permit types, whereas the State of Hawaii provides for three. This could lead to confusion for applicants and may cause problems when permits are assessed if the proposed activity is to take place in both Sanctuary and State waters. More discussion on permit types is required to ensure consistency in a co-managed sanctuary.

The Permitting Action Plan states the *"Interagency coordination for permitting and enforcement, which manages human uses in the Sanctuary, is becoming increasingly integrated and coordinated among jurisdictional agencies"* (Pg. 170, line 5-6). Although one Interagency Committee meeting has been held to discuss permitting, there has been little progress on integration and coordination.

Although this section of the plan lists the USFWS website on Page 170 (line 37), it does not mention the State of Hawaii, Department of Land and Natural Resources' website.

Appendix 2a, *Guidelines for Submitting Permit Applications* (Pg. 298) makes no reference to any State or USFWS permits that may be required in this part of the plan. There is reference to these permits in the Permitting Action Plan (Pg. 170), but a list of permits should also appear in the Guidelines (Appendix 2a). The main problem is that an applicant may not know what other permits are required.

Section G(2) *Copies of other permits* asks the applicant to include copies of other Federal, State and/or local permits issued for the permit requested, which assumes other

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agencies have already issued their permit. This suggests that the applicant would secure a permit from one agency then try to secure a permit from another which could lead to problems if one agency issues a permit without consultation with another, possibly leading to conflicting views.

Appendix 2 (Pg. 298) of the SMP provides permit guidelines and application forms. These forms appear inadequate to enable the assessment of permit applications in a manner to ensure protection of the ecological integrity of the ecosystem.

If the Sanctuary is to be managed in a coordinated and integrated way, the most effective mechanism for issuing all permits (Federal, State, local) is for the relevant jurisdictional agencies to meet together to review and discuss permit applications to ensure a coordinated response to each application. This approach has been discussed and agreed to in earlier Interagency Committee meetings and is mentioned in the Collaboration and Partnership section of the plan (Interagency Committee, Pg. 68, lines 22-23). *...The Interagency Committee will meet quarterly on all aspects of coordinated Sanctuary management, including review and development of policies, protocols, permits and other operational aspects of the Sanctuary.* However, this collaborative management approach has been lost or overlooked in the proposed Sanctuary permitting process.

The State recommends that:

- **The Permitting Action Plan mention DLNR's permit guidelines and add the State of Hawaii, DLNR website on Pg. 170, line 27.**
- **Appendix 2a of the Management Plan be revised to change Section G(2) to read: *other Federal, State and/or local permits may be required by the following Federal, State and local agencies depending on the proposed activity:* (provide a list of these jurisdictional agencies with specific permits required)**
- **Appendix 2b Permit Application Form (p306) be revised to provide an application form that requests information similar to the current State and USFWS application forms. Each jurisdiction also requests different information, which reflects their applicable statutes and regulations. The Sanctuary's application form would also require specific information that reflects its needs. An application form that provides more consistency in format will go a long way to facilitate co-management of the Sanctuary amongst jurisdictional agencies.**

C. Evaluation of Permit Requests

The plan states that *"depending on the type and location of the proposed activity, additional review may be required by partner jurisdictional agencies, additional NMSP program personnel, or outside experts."* As many of the requested permit activities are likely to take place in State waters and/or USFWS jurisdictions, sharing all permit

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requests with jurisdictional partners would strengthen collaboration, rather than leaving it to the discretion of the sanctuary permit coordinator. The State has now established a review process for Refuge permits that requests comments from all jurisdictional partners, which should be reciprocated by also requesting the State to review all Sanctuary permit applications.

The Native Hawaiian community involvement action plan (Pg. 228) states that "*the Constitution of the State of Hawai'i requires the state to care for Hawai'i's trust resources and recognizes the state's obligation to work for the betterment of Native Hawaiians* (line 35-36). It also states that "*it is imperative that the Native Hawaiian community be involved in the planning, management and operations of the Sanctuary*" (lines 38-39). However, the proposed Sanctuary permitting process does not provide for Native Hawaiian involvement in the evaluation of permits.

As part of the State's permitting process, Native Hawaiian cultural and resource management experts are requested to review and provide comments on all permit applications for activities within the State Refuge. In order to effectively co-manage the proposed Sanctuary, consistency in permit review processes is desirable.

The State recommends that this section of the Management Plan (Pg. 302) be changed to:

- **Provide for review of all permit requests by key jurisdictional partners, including the State of Hawaii.**
- **Provide for review of all permit requests by Native Hawaiian cultural and resource management experts.**

D. Consultations and Statutory Requirements

This section contains a list of a number of Federal statutes but no list of relevant State of Hawaii statutes/regulations.

The State recommends that this section of the Management Plan be changed to add the relevant State of Hawaii statutes and regulations such as Hawaii Administrative Rule, Chapter 13-60.5 to the list, along with the Federal statutes.

E. Budget

The State would note that the five-year budget for the proposed Sanctuary may not provide adequate funding for certain priority areas. For instance, the Protected Species Action Plan comprises only 1% of budget, and the Alien Species Action Plan (to prevent alien species introductions and monitor and control existing alien species in the Sanctuary) comprises only 3%. The latter area is particularly important as a threat to the ecological integrity of the sanctuary, and would seem to merit greater funding. For example, the aftermath of the *Casitas* shipwreck now requires substantial USFWS

commitment to monitoring for potential invasives where the ship's crew landed on shore *in extremis* without being able to undertake any alien species prevention protocols; other incidents of this type are all but inevitable in the future.

The State recommends that the proposed budget be rebalanced to allocate greater financial commitments to protected species, invasive alien species, vessel hazards, and enforcement.

DRAFT ENVIRONMENTAL IMPACT STATEMENT

A. General Comments

The DEIS reads well and there is a good and sound justification for most of the actions.

Many would/will argue that goal #7 objectives do not now accurately reflect most of the alternatives and should perhaps be revisited; especially given the statements on Page 1-12, lines 10-12.

Throughout the Executive Summary and in subsequent descriptions of the role on the NMFS, no mention is made of their pivotal role in managing marine mammals, especially the critically endangered Hawaiian monk seal.

The State recommends that this oversight be rectified.

It is also important to be inclusive throughout. The EO calls for not only consultation with the Federal agencies and the State of Hawaii, but also advice from the Western Pacific Regional Fishery Management Council (WPRFMC) and the Reserve Advisory Council (RAC). This is missed on Page ES-5, lines 30-35.

The State recommends that the section of the document noted above be amended to include consultation with the RAC and WPRFMC. We would note that the necessity to consult with the latter organization may be rendered moot if the decision is made to manage fisheries under the authority of the Sanctuaries program rather than under the Magnuson-Stevens Fishery Management Act (a course of action that we would note is implied in these documents).

The two key principles that are missing from the overall management approach are a precautionary approach to resource management and the need to maintain the biodiversity of all resources. Language similar to the precautionary approach is used to describe erring on the side of resource protection when uncertainty exists regarding potential impacts, but we are not sure this goes far enough in determining impacts.

The State has substantial concerns regarding the apparent absence of a precautionary approach for assessing permit impacts, particularly for Class B permits. It appears that a few phone calls or e-mails could suffice to obtain permit approval for activities with unknown impacts to the ecosystem, and which could

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include extractive uses. We recommend, for all permits, a full external review by a committee of agency representatives. In addition, if there are "legal problems" with a permit applicant, such as a record of previous illegal activities, we recommend that this be taken seriously, potentially preventing access to these public trust resources.

While we acknowledge that a few of our comments were incorporated into the draft Regulations and are reflected in the alternatives, we are still concerned about the Special Ocean Uses criteria. The process to gain approval for commercial photography and/or documentaries seems overly difficult. At the same time, the process to gain approval for other commercial uses does not take into account the unique and fragile nature of some of the ecosystems of the NWHI.

As noted previously, the State does not support broad scale commercial activities (including commercial diving and cruise ship visits) in the NWHI, and further policy discussions are needed to define where appropriate Special Ocean Uses (other than photography or filming) should or should not occur.

B. Recreation and Ocean-based Ecotourism Activities

The SMP Ocean-based Ecotourism and Recreation Action Plan proposes to investigate ecotourism locations. According to the SMP, "The first areas that would be investigated include Midway Atoll, Kure Atoll and locations outside SPAs" which, from the maps provided, could include RPAs at Nihoa, Mokumanamana, and other places (Pg. 201). The DEIS provides the following useful descriptions of tourism and recreation in the NWHI:

There appears to be inconsistencies between the draft Regulations and what is discussed in this section of the SMP. The State desires that recreation and tourism in the proposed sanctuary be confined primarily to the Midway SMA. A principal concern is with the potential proliferation of ocean-based ecotourism to unsustainable levels in the NWHI, with consequent damage to resources (as has happened in the Galapagos Islands).

C. Pollution

In our letter of March 24, 2006, we underscored substantial concerns about the potential for sanctuary designation to lead to increased pollution levels as a result of: 1) increased vessel traffic, and 2) lowered pollution standards as proposed in the draft Regulations. We find the DEIS analysis of pollution sources (Pgs. 3-84 to 3-87) to be quite useful, underscoring the "multitude of wastes" produced by seagoing vessels, including cargo, fishing, cruise ships, research vessels, U.S. Coast Guard ships, and recreational vessels and underscoring the potential discharges from vessels including sewage, gray water, bilge water, hazardous wastes, and solid wastes. The DEIS notes that gray water can include nitrogen, phosphates, copper, lead, mercury, nickel, silver, zinc, oil, grease, metals, pesticides and medical wastes. It also notes that cruise ships, such as those which

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have recently begun to visit Midway Atoll, "generate large volumes of waste and may have significant impacts on the marine environments they transit. Large cruise ships can generate as much as eleven million gallons (41,640,000 liters) of wastewater per day (NOAA 2003b). Solid wastes generated by cruise ships may be incinerated on the vessel and the ash discharged at sea, or the wastes may be disposed of or recycled at onshore facilities (USEPA 2000)." According to the DEIS, the USFWS bans the dumping of cruise ship waste in the Midway Refuge. The SMP also notes the presence of "NOAA vessels, Oscar Elton Sette, Hi'ialakai, Ka'imimoana and UH's R/V Kilo Moana and R/V Kaimikai-O-Kanaloa as well as chartered vessels for marine debris removal. These vessels are most active in the NWHI during the months of April through November. These vessels average 200 feet in length, weigh 2,300 tons, and carry 50 crew and researchers and other staff, and can generate several thousand gallons of sewage and gray water per day" (Pg. 147).

We agree with NOAA's assessment that "The most persistent and significant threat to water quality in the ROI (Region of Influence) is the vessels that transit the area. Vessel traffic presents the risk of a large oil spill or release of cargo that could greatly impair the marine water quality of the affected environment" (Pgs. 3-87).

The State wishes to underscore its deep concerns regarding the apparent relaxing in the draft Regulations of pollution standards currently in effect (as outlined in our letter of March 24, 2006). We also note with additional concern that, despite the importance of preventing hazards associated with vessel traffic, including the shipwreck of the *Casitas* last summer, the Vessel Hazards Action Plan appears to make up only 1% of the Sanctuary's proposed five-year budget.

D. Specific Comments

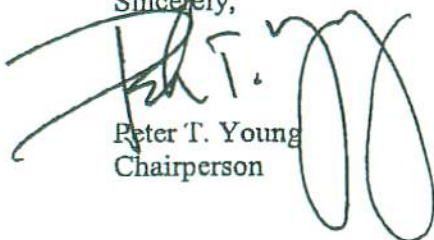
The State also offers the following specific comments on the DEIS:

1. On Page ES-4, lines 23-25, the sentence needs to be changed. The correct representation of the State's lead on World Heritage is found on Pages 1-5 and 1-6 lines 36 & 1-3.
2. On Page ES-6, line 5, the sentence should read "...In addition, a sanctuary can foster coordinated management AND RESEARCH, towards achieving a greater understanding of marine ecosystems of the NWHI."
3. On Page 1-4, lines 1-2, it should probably read Hawaiian genealogies through the Kumulipo (Hawaiian Creation Chant) identify the coral polyp as the first living creature to emerge from the sea.
4. In Table ES-3 under the Summary of potential resource impacts, the impact analysis recreational fishing is not accurate in Alternative 3.

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Once again, the State of Hawaii thanks NOAA for the opportunity to comment on these documents and believes that this is a useful step toward attainment of a co-managed NWHI National Marine Sanctuary.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. Young', followed by two large, overlapping loops.

Peter T. Young
Chairperson

cc Dan Polhemus
Athline Clark